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July 1, 1980

Federal Election Commission
1325 K Street, N. W.
Washington, DC 20463

Re: Advisory Opinion Request 1980-61 WITHDRAWAL

Gentlemen:

On behalf of Americans for an Effective Presidency ("AEP"), we wish to respond to the comments of Common Cause, regarding the above Advisory Opinion Request, made in their letter dated June 26, 1980.

Common Cause there advances the extraordinary view that a group may not form to make independent expenditures in Presidential elections. If the view were correct, every independent committee which incurred expenditures in excess of $1,000 in connection with the 1976 Presidential election and which has incurred or intends to incur such expenditures in connection with the 1980 Presidential election, has violated or will violate this provision. Common Cause asks the Commission, in effect, to ignore its practice over the past four years of permitting such independent expenditures.

More specifically, Common Cause seeks to reargue an issue that was specifically resolved in Buckley v. Valeo, 424 U.S. 1 (1976). Prior to the Buckley case, Section 608(e)(1) of the Federal Election Campaign Act prohibited individuals and groups from making independent expenditures. Advocates of Section 608(e)(1) claimed that the prohibition was necessary as a "loophole-closing provision" to prevent circumvention of restrictions on contributions to candidates." The Supreme Court disagreed, concluding that "no substantial societal interest would be served" by such a provision, and that so long as independent expenditures are made "totally independently of the candidate and his campaign" and so long as there is an "absence of prearrangement and coordination of an expenditure with the candidate or his agent," restriction on such expenditure too

"heavily burdens core First Amendment expression." The Court pointed out that such expenditures have very little "potential for abuse"* and held this limitation on "independent expenditures" to be unconstitutional under the First Amendment.

Following the Buckley decision, Congress amended the Federal Election Campaign Act to remove Section 608(e)(1) and certain other provisions which the Court had declared to be unconstitutional. Left in place, however, is Section 9012(f) of the Presidential Election Campaign Fund Act, which is the focus of the Common Cause letter and which was in part the subject of our letter of May 15, 1980.

The Commission previously had occasion to consider the meaning of 9012(f) in 1976, following the decision in Buckley. At that time, too, a question was raised as to whether 9012(f) forbids independent expenditures. After extensive hearings, including thorough discussion by the witnesses and the Commission regarding independent expenditures by organized groups, the Commission adopted regulations that interpreted Section 9012(f) as not barring such independent expenditures. See, e.g., Testimony of Robert Thomson and William C. Cramer (June 9, 1976); Testimony of John R. Bolton (July 7, 1976). The Commission's comprehensive regulations were accepted by Congress, which did not exercise its legislative veto with respect to them. Thereafter, the United States District Court in Republican National Committee v. Federal Election Commission, ___ F. Supp. ___ (S.D.N.Y., affirmed, 100 Sup. Ct. 1639 (1980)), stressed the point that the Act permits "uncoordinated expenditures . . . without limit" (emphasis added).

Common Cause reluctantly acknowledges the fact that "groups" may have some limited right to pool together their own money to express personal views. Common Cause argues, however, that AEP's proposed effort is not protected because it may be too effective. It is all right, according to Common Cause, for a small group to make small expenditures, but a group cannot engage in a large fund raising effort. Common Cause refers to newspaper stories about alleged efforts to raise "tens of millions" of dollars for "independent expenditures," and argues that expenditures of such sums "by a professionally-run partisan campaign organization" are necessarily prohibited by § 9012(f).

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*/ "[E]xpenditures made totally independently of the candidate and his campaign . . . [alleviate] the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate."

424 U.S. at 47.

Under this curious interpretation of the Buckley case, political views may be independently expressed only so long as the effort to do so is relatively small and unprofessionally run. How strange it is for Common Cause to suggest that open debate, upon which our political system is based, somehow becomes illegal when it is too vigorous.

Apart from this frivolous distinction that Common Cause would make in First Amendment protections, it must be pointed out that AEP has not asked for an opinion either about its fund raising efforts, or about any other planned activities. Were those matters to be raised, the issue would not turn on whether an independent effort is either large or effective. Rather, the question would be whether it is truly independent.

Obviously, Common Cause is asking the Commission to rule on hypothetical facts, not posed by AEP, that may or may not be relevant at some future date.

Our letter of May 15, 1980, asked for an opinion with respect to whether AEP could accept up to $5,000 from each contributor although it intended to make expenditures solely in support of a single candidate. We previously withdrew our request for an opinion on this issue since AEP will not be a single candidate committee.

The only other question remaining, posed by our letter, is whether "several individuals" can "[solicit] contributions from the public and [make] expenditures in the general election" for the support of candidates, so long as they are "made without cooperation or consultation" and "not . . . in concert" with a candidate or the agent of a candidate.

We have no doubt that this general question was long ago answered by the past practices of this Commission and by the Buckley decision, and AEP would not have imposed on the Commission's time to deal with it had we not also sought an opinion with respect to the amount of contributions that a single-candidate committee might receive. More important, AEP has no desire, now, for the Commission to opine as to what kinds of future activities might or might not destroy the independence of AEP's effort. At least until such time as the course of its effort is fully set, AEP is content to rely on its own counsel. Furthermore, upon review of the regulations of the Commission, it appears that our request for an opinion as it is now limited constitutes a request for a "general question of interpretation" that is prohibited by 11 CFR § 112.1(b).

We ask, therefore, that the factual issues raised in the Common Cause letter be ignored, and that our request for an opinion be withdrawn.

The only real question is why Common Cause, looking to the newspapers rather than our letter, should object in so strident a fashion to AEP's request for so limited an opinion. We can only surmise that Common Cause regrets the Buckley decision and will oppose every effort, legitimate or not, to exercise the First Amendment rights there set forth. The effort is premature in the case of AEP's position. More important, it is unworthy of an organization such as Common Cause so blindly to devote itself to the restriction of independent political expenditures. To borrow the words of the Supreme Court, its position "too heavily burdens core First Amendment expression."

Sincerely,

Roderick M. Hills of
LATHAM, WATKINS & HILLS

RMH:sc